Supreme Court, U.S.
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No. 05-1079

In The Supreme Court of the United States

RAFAL PIETRZAK,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

JOHN R. ROACH
Criminal District Attorney
Collin County, Texas

JEFFREY GARON*
Assistant Criminal District Attorney
210 S. McDonald Street, Ste. 324
McKinney, Texas 75069
State Bar No. 00790746
PHONE (972) 548-4323
FAX (972) 548-4324

*Counsel of Record

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In state habeas corpus proceedings brought by a Polish foreign national, are Texas state courts required to give effect to claims concerning failure to comply with consular notification requirements of the Vienna Convention on Consular Relations and the Warsaw Convention without regard to procedural default rules?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of Texas, respectfully requests this Court to deny the petition for writ of certiorari. The Question Presented has been fully answered adversely to Petitioner in *Sanchez-Llamas v. Oregon,* No. 04-10566, 2006 WL 1749688 (U.S. June 28, 2006), and no compelling reason exists to take up this petition to revisit the now-settled issue.

Additionally, Petitioner has not established a connection between the violation of his consular notification rights and any harm he suffered at trial, and suppression is not an available remedy.

JURISDICTION

The Texas Court of Criminal Appeals denied Petitioner's application for writ of habeas corpus on November 23, 2005 without written order. Petitioner seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

I. Procedural History

Petitioner was convicted of aggravated sexual assault of a child younger than fourteen years old, he was granted an out-of-time appeal, and his sentence was affirmed by the state court of appeals. *Pietrzak v. State,* No. 05-01-01687-CR, 2002 WL 31957883 (Tex. App. – Dallas Jan. 23, 2003, pet. ref'd) (not designated for publication).

The Texas Court of Criminal Appeals denied Petitioner's August 2003 state application for writ of habeas corpus without written order on the findings of the trial court without a hearing. *Ex parte Pietrzak,* No. 49,639-02 (Tex. Crim. App. Nov. 21, 2004) (not designated for publication). The Court of Criminal Appeals denied Petitioner's subsequent state application for writ of habeas corpus – the instant application – without written order. *Ex parte Pietrzak,* No. 49,639-03 (Tex. Crim. App. Nov. 23, 2005) (not designated for publication).

II. Additional Material Facts

The claims raised in the instant application for writ of habeas corpus – that arresting officers violated Petitioner's right to consular notification under the Vienna Convention on Consular Relations and the Warsaw Convention – were not raised earlier in Petitioner's August 2003 application for writ of habeas corpus, in his direct appeal, or in any trial proceeding.

ARGUMENT

I. The Question Presented has been fully answered adversely to Petitioner by this Court's recent decision in *Sanchez-Llamas v. Oregon,* No. 04-10566, 2006 WL 1749688 (U.S. June 28, 2006), which was issued after Petitioner filed his petition for writ of certiorari

Under Texas state law, Petitioner procedurally defaulted his Vienna Convention and Warsaw Convention habeas corpus claims in two ways. First, he did not raise the claims at trial or on direct appeal. *See Ex parte Pena,*

71 S.W.3d 336, 338 (Tex. Crim. App. 2002); *Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001) (writ of habeas corpus may not ordinarily be used to litigate matters that could have been raised at trial and on direct appeal). Second, he did not raise the claims in his earlier August 2003 writ application. *See* TEX. CODE CRIM. PROC. art. 11.07, § 4 (barring claims raised in a subsequent writ application if those claims could have been raised in an earlier application).

In *Sanchez-Llamas v. Oregon*, this Court decided that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims. *Sanchez-Llamas*, 2006 WL 1749688, at *17. The guiding principle that the procedural rules of domestic law, including procedural default, generally govern the implementation of an international treaty (*see id.*, at *14) would apply as well to Petitioner's Warsaw Convention claim. Thus, in accordance with *Sanchez-Llamas*, the Texas Court of Criminal Appeals was free to dismiss Petitioner's Vienna Convention and Warsaw Convention claims as procedurally defaulted.[1]

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[1] The Court of Criminal Appeals *denied* Petitioner's subsequent writ without written order. It did not, as Petitioner asserts (*see* Petition for Writ of Certiorari at 1, 7), adopt the trial court's findings of fact and conclusions of law, as those urged *dismissal* under article 11.07, section 4 of the Texas Code of Criminal Procedure (barring claims raised in a subsequent writ application if those claims could have been raised in an earlier application). *See Ex parte Thomas*, 953 S.W.2d 286, 288-89 (Tex. Crim. App. 1997) (distinguishing "denial" from "dismissal"); Appendix 2 to Petition for Writ of Certiorari. Petitioner's Question Presented nevertheless has validity to this case, since the denial of Petitioner's writ could have been based not on article 11.07, section 4 but on the fact

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Since the Question Presented in this case has already been decided adversely to Petitioner in *Sanchez-Llamas*, there is no compelling reason for this Court to grant certiorari. *See* Rules of the Supreme Court of the United States, Rule 10 (providing that review on writ of certiorari is not a matter of right, but of judicial discretion, and should be granted only when compelling reasons warrant). This Court should deny this petition for writ of certiorari.

II. This Court should also deny this petition because (1) Petitioner has not established a connection between the violation of his consular notification rights and any harm he suffered at trial; and (2) the judicial remedy of suppression is not available

A. Petitioner has not established a sufficient connection to harm

The heart of Petitioner's complaint is that he gave pre-trial videotaped and written statements and wrote a "note of apology" to his victim that were admitted at his trial. Petition for Writ of Certiorari at 7-8. He asserts that if he had been notified of his right to request assistance from the Polish Consulate he would have done so and "would ultimately have refused to give any statement." *Id.* at 8. But that is a purely speculative leap.[2]

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that he procedurally defaulted his claims at a more fundamental level by failing to raise them at trial or on direct appeal.

[2] It is simply not possible to know such things as whether and when Petitioner would have exercised his notification rights; whether and how the Polish Consulate would have responded to Petitioner's request for assistance; the reasons Petitioner desired to make his

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Equally speculative is Petitioner's assertion that the Polish Consulate would have provided additional investigation, particularly investigation in Poland yielding admissible mitigation evidence (*id.* at 8), and Petitioner does not even ground this speculation with any suggestion of any particular mitigating evidence that additional investigation could have uncovered.

Finally, Petitioner's assertion that the Polish Consulate would have helped him assert his Constitutional right to counsel and obtain competent counsel (*id.* at 8) ignores two facts. First, as this Court noted in *Sanchez-Llamas*, a foreign national detained on suspicion of crime, like anyone else in this country, is already entitled to an attorney and is protected against compelled self-incrimination. *See Sanchez-Llamas*, 2006 WL 1749688, at *11. Second, Petitioner did have the benefit of trial counsel. And as Petitioner acknowledges, that counsel has been found effective by the Texas Court of Criminal Appeals. Petition for Writ of Certiorari at 5.

In short, presented with little more than speculative harm, this Court has no compelling reason to redress the violation of Petitioner's consular notification rights.

B. Suppression is not available

Using reasoning that would apply equally to the Warsaw Convention, this Court has held in *Sanchez-Llamas* that the judicial remedy of suppression is not available for a violation of the notification provisions of the

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statements and apologize to his victim; or how the involvement of the Polish Consulate would have influenced those reasons.

Vienna Convention. *See Sanchez-Llamas,* 2006 WL 1749688, at *11. Thus, to the extent Petitioner seeks suppression of his videotaped or written statement or his note of apology, he is not entitled to relief.

CONCLUSION

For the foregoing reasons, Petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN R. ROACH
Criminal District Attorney
Collin County, Texas

JEFFREY GARON*
Assistant Criminal District Attorney
210 S. McDonald Street, Ste. 324
McKinney, Texas 75069
State Bar No. 00790746
PHONE (972) 548-4323
FAX (972) 548-4324

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Attorneys for Respondent